United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL BRIEF

74-1869

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-1869

UNITED STATES OF AMERICA,

Appellee,

-v.-

GEORGE STOFSKY, AL GOLD, CHARLES HOFF
and CLIFFORD LAGEOLES,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANTS CHARLES HOFF and CLIFFORD LAGEOLES

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SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANTS
CHARLES HOFF and CLIFFORD LAGEOLES

This Brief addresses primarily the issues raised by defendants' second post-trial motion for a new trial on the basis of newly discovered evidence and defendants' motion for dismissal of the indictment on the ground that the grand jury lacked power to return the indictment.

Defendants Hoff and Lageoles, tried jointly with defendants Stofsky and Gold, each were convicted on several counts of accepting illegal payments in violation of the Taft-Hartley Act, 29 U.S.C. § 186(b), and on a single count of

conspiracy to commit those substantive offenses, 18 U.S.C. § 371. Defendant Hoff also was convicted on one count of tax evasion for failure to report the same payments in violation of 26 U.S.C. § 7201. See Brief on Behalf of Appellants Stofsky and Gold (hereinafter "Stofsky Brief") at 1-2. The convictions were returned on February 27, 1974. On April 22, 1974 defendants filed their first motion for a new trial on the ground of newly discovered evidence; the motion was denied in a memorandum and order dated June 12, 1974. Defendants were sentenced on May 31, 1974.

Appeals were taken from the judgments of conviction and the denial of the new trial motion. Briefs were filed in this court in August, 1974. On September 12, 1974, defense counsel received a letter from the Assistant United States Attorney stating that he had obtained additional information relating to the testimony given at trial by Jack Glasser, the government's major witness and its only direct witness against defendants Hoff and Lageoles (A.22).[1/]

1/ References to "A-__" are to pages in the Supplemental Appendix. References to "__a" are to pages in the original "Joint Appendix."

Based upon review of this new evidence, the parties entered into a stipulation staying the appeal until a second new trial motion could be presented to the district court (A-28). The stipulation further provided that in the event the new motion was denied, appellants would submit supplemental or revised briefs to this court. The stipulation was signed by Circuit Judge Mansifeld on September 26, 1974 (A-25).

On October 10, 1974 defendants filed motions in the district court for a new trial based on the newly discovered evidence (A-6, 33). While those motions were pending, on January 27, 1975, defendants filed motions for an order dismissing the indictment on the grounds that the grand jury which returned the indictment was without jurisdiction to do so (A-89). See United States v. Fein, 504 F.2d 1170 (2d Cir. 1974). On March 24, 1975, defendants filed motions to dismiss the indictment on the ground that the prosecutor who presented the case to the grand jury was not properly authorized to represent the United States and to appear before the grand jury.

On June 4, 1975 the district court denied the motions for a new trial and for dismissal of the indictments (A-82, 128). Appeals were taken to this court in due course,

and joined with the pending appeals which had been stayed. [2]

I.

The Motions For A New Trial Should Have Been Granted

Hoff and Lageoles were convicted on the testimony of one man -- Jack Glasser -- who, even the government now admits, committed massive perjury on material issues going to the heart of the theory of the defense at trial. Under similar circumstances, the Supreme Court, this court, and the other circuit courts of appeals have held that a new trial is mandated by the Fifth and Sixth Amendments and in the interests of justice.

A. The Factual Basis For A New Trial.

The evidence introduced at trial and the evidence subsequently revealed with respect to the first motion for a new trial is discussed in detail in the briefs previously submitted to this court. Because of its central importance to

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[2] We join in the Supplemental Brief for Stofsky and Gold. Point III of that Brief raises the question of the appearance of the Strike Force special prosecutor before the grand jury.

the new trial motions, we recapitulate here the testimony at trial of Jack and Betty Glasser, in particular the testimony concerning the sources of the Glassers' wealth. We then review the evidence adduced upon each of the new trial motions.

(1) The Proceedings At Trial

Glasser was the only witness who testified that appellants Hoff and Lageoles received illegal payments, and it is solely upon his testimony that their convictions rest. In essence, Glasser testified that he had received a total of about $15,000 in cash from six manufacturers and that he had paid about $10,000 of such sums to the four defendants over a period of three years in consideration of the defendants' consent to contracting violations by the manufacturers. Glasser further testified that he had pocketed the remaining $5,000 and that he had spent it as he received it, without depositing any portion of it in a bank. He denied keeping cash in a safety deposit box (167a).

The defendants denied receiving any portion of the monies Glasser claimed to have paid to them. To the extent that Glasser received monies from the manufacturers, defendants maintained that Glasser kept such sums in toto.

No other witnesses testified either that they had made payments to Hoff and Lageoles, that they had witnessed such payments from Glasser, or that they had reason to believe that Glasser had made such payments. Thus, the outcome of the trial turned entirely on the jury's determination whether Glasser was telling the truth beyond a reasonable doubt. Cf. Napue v. Illinois, 360 U.S. 264, 269; United States v. Badalamente, 507 F.2d 12, 15 (2d Cir. 1974).

At the trial, the defense attempted to establish its claim that Glasser kept whatever money he had received from the manufacturers. On cross-examination, Glasser revealed that his substantial interest income in 1972 had been earned on bank accounts of $120,000 (161a). Glasser claimed that his wife had received the principle years earlier in the form of inheritances from her parents, who died in 1940 and 1944, and that the money had been deposited in joint accounts (163a). Defense attempts to impeach Glasser's explanation for the source of his wealth were almost totally frustrated because Glasser allegedly had destroyed all his records when he moved to Miami (164a). The sole exception was that the defense was able to introduce probate records which showed that Mrs. Glasser had inherited less than $3,000 from her

parents' estate (Defense Exhibits AM and AN). The prosecution explained this discrepancy -- as it turned out erroneously, but at the time apparently to the jury's satisfaction -- by suggesting that probate records give an "incomplete picture" and that Mrs. Glasser received the inheritance in the form of inter vivos gifts, trusts, under-the-table payments, and other legalistic methods which, he implied, the jurors as laymen could not fully comprehend (628a). 3/

3/ The full "explanation" of the Assistant United States Attorney was as follows:

> "I don't want to pass without mentioning the documents which the defendants put in about the inheritance with respect to Mr. and Mrs. Glasser. They substantially undermine what Mr. Glasser said at trial to this extent, to the extent that they reflect what passed at the time of death in that fashion. They say nothing about what may have passed as a result of gifts prior thereto, what trusts may have been in existence. Nothing about that. They say nothing about what the [sic] moneys were received in violation of the estate tax laws under the table by Mr. and Mrs. Glasser, or directly Mrs. Glasser. They say nothing about that. They give you an incomplete picture of documents prepared by a lawyer. You can look on the face of them. They are exhibits prepared by a lawyer, affidavits prepared by a lawyer if you ever signed one prepared by a lawyer, you will know what they look like. They give you at the very best a marginal look of what took place at that time" (628a).

For discussion of the impropriety of such "testimony" by the prosecutor, see post at 27, n.14.

The government, recognizing that the issue of the source of the Glassers' fortune was "a central one in this case" (178a), called Mrs. Glasser as a witness on its direct case, over defense objection, for the sole purpose of corroborating her husband's account of the source of the money (173a, et seq.). She testified that she inherited about $100,000 in cash, stocks, and bonds, plus valuable jewelry, which she maintained she still owned (178a-180a). She further corroborated Glasser's testimony that the money he received from manufacturers never was kept in a safety deposit box (183a).

In the summations to the jury, prosecution and defense emphasized the central issue of the Glassers' credibility to the jury's determination of defendants' guilt or innocence. Thus, defense counsel argued strenuously that Glasser had lied about the source of his wealth and that he had kept all the money he received from the manufacturers. The prosecutor countered by arguing that Glasser had no motive to lie: he had been granted transactional immunity before implicating the defendants, and therefore the only crime for which he could be convicted was perjury.

"Now, ask yourselves why in light of that fact is it that Mr. Glasser would come here now fully shielded and protected from any kind of prosecution whatever regarding those crimes he acknowledged, why does he come here and place himself in the only position he could possibly place himself in, in jeopardy by perjuring himself. That is the only thing after having received full immunity that he need worry about. What is the motive at that point for Glasser to take the stand and perjure himself? Does it make any sense to you? The chronology of the way this happened is of some significance. Glasser received the quid pro quo at the beginning. He got immunity at the beginning, and it is uncontradicted that he didn't tie these defendants in in any fashion, I believe, until after he had been immunized. There was absolutely no motive for him to do that at that point.

You can contrast that with the situation where, let's say, a co-defendant, someone named in the indictment who has pleaded guilty before trial and is going to testify against another defendant who is going to trial, that co-defendant who has pleaded guilty has not yet been sentenced, he still has a motive to lie, he still has an interest in furthering the Government's case because he knows down the line he is going to face a sentencing judge, he has not yet gotten his quid pro quo. That is a vast distinction from Mr. Glasser, who received total immunity at the outset" (627a).

The district judge highlighted the questions of motive and credibility in his charge to the jury:

> "Further, Jack Glasser had been granted what we call 'transaction' immunity. What this means is that the government cannot prosecute him at all for the crimes he has admitted from the witness stand at this trial. The impact of a grant of immunity must be weighed carefully by you, and you should scrutinize the testimony of these witnesses with special care. You should seek to determine from all of the relevant evidence with respect to this matter whether or nottheir desire for immunity, or the grant of immunity, might have contributed to a motive to testify falsely.
>
> For instance, with respect to Glasser, the defendants have suggested two possible motives: one, that he bears a grudge against the defendants and is using his grant of immunity as a shield behind which to 'get them'; and/or, second, that Glasser and other witnesses, faced with possible criminal prosecution, have exchanged testimony which they think the government wants to hear, in return for immunity with respect to their own crimes.
>
> The government counters with the fact that witnesses testifying under immunity face the same risk of a perjury prosecution should they give false testimony, just as any other witness at this trial, and, in fact, that the purpose of a grant of immunity is to encourage otherwise reluctant witnesses to testify truthfully.

> It is for you, and you alone, to assess the motives of the witnesses in this case" (671a).[4]

The jury apparently was divided and unsure about whether or not to believe Mr. Glasser's testimony. Initially it reported to the court that it was deadlocked and unable to reach a verdict on each of the counts (except the conspiracy count) upon which Glasser's testimony was crucial (684a, et seq.). It was only after the judge delivered a "modified" Allen charge, over objection of the defense, that the jury returned verdicts of guilty on the substantive counts against Hoff and Lageoles (689a).

(2) The Evidence Adduced Upon The First New Trial Motion

Subsequent to the trial new evidence was uncovered showing that Glasser had made cash deposits of about

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4/ The judge's favorable charge with respect to Glasser's credibility should be contrasted with his charge with respect to the defendants, who, the judge noted, had a clear interest in lying if they were guilty:

> "[W]hen a defendant does take the stand, he is tested by all the same rules and guides that any other witness is tested by. You know, of course, that a defendant is interested, vitally interested, in the outcome of the case. Interest is a factor which you must take into consideration when assessing the testimony of each and every witness who has taken the stand, whether presented by the government or by the defense" (672a).

$57,000 from 1967 until 1971. The defendants moved for a new trial (698a), arguing that the new evidence proved that Glasser had lied at trial with respect to the source of his wealth, and that it lent substantial support to the defense theory that Glasser had kept all the money he received from the manufacturers.

The government responded with two affidavits prepared by the Assistant United States Attorney -- one of which was sealed and which defense counsel still has not seen -- which attempted to explain away the cash deposits. Nevertheless, the government admitted that Glasser had lied at trial about the inheritance from Mrs. Glasser's parents, and that he had lied to the Assistant United States Attorney when first confronted with the new evidence.

Thus, Glasser first tried to explain the entire $57,000 to the Assistant United States Attorney by claiming that it constituted proceeds from jewelry sales (797a).[5/] When this preposterious explanation was rejected, a more elaborate story was put forth by Glasser and repeated

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5/ It will be recalled that Mrs. Glasser testified at trial that she still owned all the valuable jewelry she had inherited from her parents.

as truth by the United States Attorney. Glasser admitted that the entire $120,000 fortune did not derive from inheritances from Mrs. Glasser's parents; rather, he claimed that $40,000 to $50,000 could be attributed to that source (746a). He further admitted to keeping over $21,000 in payments he received from manufacturers (743a, 750a, 798a), but now claimed that he also had given the defendants further sums other than those about which he testified at trial (743a-744a). Moreover, he admitted that he "may" have lied when he testified that he spent the money he received from the manufacturers as he received it and that he never deposited any part of it (747a).

Mrs. Glasser admitted, also through the Assistant United States Attorney, that she had testified falsely at trial when she said that her inheritances totalled about $100,000; she, too, now put the figure at $40,000 to $50,000 (748a). Her excuse was that she "misunderstood the questions" about the only matter for which the government called her as a witness. Mrs. Glasser also admitted that she -- and her husband -- had lied when they testified that no cash ever was kept in a safe deposit box (748a).

Finally, Glasser provided the Assistant United States Attorney with an elaborate new explanation for the remaining portion of the cash deposits, attributing it in part to sale of jewelry, Christmas gifts, vacation gifts, overtime commissions and miscellaneous commissions (743a-744a). This explanation was vague, without documentation, and in direct conflict with material aspects of the Glassers' testimony at trial, such as Mr. Glasser's claim that he had no income other than his salary and the payments from the manufacturers, that he always reported on his tax returns "every cent" he earned, and Mrs. Glasser's statement that she still owned all of the jewelry.

Nevertheless, the district court credited Glasser's new explanation and denied the motion for a new trial.[6/]

(3) The Evidence Adduced Upon The Second Motion For New Trial

Subsequent to the denial of the first new trial motion and to the filing of appellate briefs, the government revealed further new evidence relating to the amount and

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6/ We discuss the standard applied by the district and its application of the facts thereto, post.

sources of Glasser's finances. That evidence showed that Glasser had made bank deposits from 1962 through 1971 of over $150,000, rather than the $57,000 which had been discovered at the time of the first new trial motion, and that most of such deposits had been in cash. While the government frantically tried once again to construe this new evidence in a manner which would preserve some scintella of Glasser's credibility, no coherent explanation for these deposits, and their obvious implications, could be made.

(a) The government and Glasser now admit that no more than $10,000, if anything, of Glasser's assets of $120,000 at the time of trial came from inheritances from Mrs. Glasser's parents.[7/] This admission totally undercuts not only the entire trial testimony of both Glassers as to the

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7/ Glasser now estimates the total inheritance to have been $30,000 - $40,000, in contrast to his testimony, and that of Mrs. Glasser, that the total was in excess of $100,000, and in contrast to their claim at the time of the second new trial motion that the total was $40,000 - $50,000. Compare Exh. 7 of the Sabetta affidavit of October 27, 1974 (A-69) with earlier Sabetta affidavit (746a). More to the point, however, the government now states that as of 1960, the Glassers had no more than $10,000 in savings, and that it is unable to say even if this amount was derived from Mrs. Glassers' parents (A-69).

source of their "small fortune," but also the entire "explanation" offered by the government in response to the first new trial motion. Clearly, the overwhelming bulk of the deposits came from independent and as yet unexplained and undocumented sources.

(b) The government and Glasser now admit that Glasser deposited substantial amounts of cash which he received from manufacturers (A-67, 68). This contrasts with Glasser's perjured testimony at trial that he never deposited such payments and with the government's half-hearted admission in response to the first new trial motion that "some of the money may have been deposited" (747a).

(c) Glasser now admits to the government that he held and accummulated, in a safe deposit box, substantial sums of money which he had received from manufacturers before finally depositing such sums at a later date in his bank accounts (A-67, 68). This revelation contrasts with the Glassers' testimony at trial that no cash was kept in safe deposit boxes and with the half-hearted and incomplete admission in response to the first new trial motion that some money was so kept. It also undercuts completely the government's attempt in response to the second new trial motion to explain

away bank deposits of $6,808.44 and $12,600 as clearly not attributable to manufacturers' payoffs because of their unusual size (see Sabetta affidavit at A-46, 47).[8/]

B. The Proper Standard

The proper standard to be applied in determining a motion for a new trial turns on the nature of the new evidence and the circumstances of its prior non-discovery. It is beyond peradventure that deliberate government suppression of evidence merely favorable or otherwise material to the defense ipso facto requires a new trial. Brady v. Maryland, 373 U.S. 83. The same rule applies, even in the absence of intentional suppression, if the high value of the undisclosed evidence could not have escaped the prosecutor's attention. United States v. Polisi, 416 F.2d 573, 577 (2d Cir. 1969); United States v. Keogh, 391 F.2d 138, 146-147 (2d Cir. 1968).

8/ Indeed it is inconceivable that if Glasser had accummulated money from any of the sources proffered as the "explanation" for Glasser's wealth at the time of the first new trial motion (743a-744a), he would have put such money in a safe-deposit box. The only rational explanation is that all such sums were manufacturers' payoffs.

This court has required a higher standard of materiality where the government's failure to disclose evidence is merely inadvertent or negligent and where the evidence cannot be deemed to have been of such a nature that its high value to the defense could not have escaped notice. In this posture, a new trial is required if "there was a significant chance that this added item, developed by skilled counsel . . . could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." United States v. Sperling, 506 F.2d 1323, 1333 (2d Cir. 1974); United States v. Miller, 411 F.2d 826, 823 (2d Cir. 1969); United States v. Seijo, 514 F.2d 1357, 1364 and n.9 (2d Cir. 1975).[9/]

Where the new evidence can in no way be attributed to government misconduct or neglect, two standards have developed. The traditional test, applied in ordinary cases, was first proposed in Berry v. Georgia, 10 Ga. 511. It

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9/ This sliding scale standard for evaluating Brady violations has not been followed by the Supreme Court. In Giglio v. United States, 405 U.S. 150, the Court refused to draw any distinction between negligent or intentional non-disclosure, noting that it is the responsibility of the prosecutor to carry the burden of "insur[ing] communication of all relevant information on each case to every lawyer who deals with it." 405 U.S. at 154.

requires the party seeking a new trial to show that the new evidence is of such a nature that, on a new trial, it probably would produce an acquittal. See, e.g., United States v. Polisi, supra, 416 F.2d at 577.

A more liberal standard has been applied, however, in cases in which there has been a recantation by a material witness or where the new evidence proves that such a witness gave false testimony at trial. In such cases, a new trial must be granted if the newly discovered evidence might have produced a different result at the first trial. Larrison v. United States, 24 F.2d 82, 87 (7th Cir. 1928). The Larrison standard was approved by numerous lower federal courts, including this court and the Southern District of New York. See United States v. Miller, 411 F.2d 825, 830 (2d Cir. 1969); United States v. Hiss, 107 F.Supp. 128, 136 (S.D.N.Y. 1952), aff'd. 201 F.2d 372 (2d Cir. 1953), cert. den., 345 U.S. 942; Gordon v. United States, 178 F 2d 896 (6th Cir. 1949). Indeed, one of the clearest statements of the rule came in United States v. Polisi, supra:

> "When the conviction is shown to be based even in part upon perjured testimony, however, a court will not stop to inquire as to the precise effect of the perjury, but will order a new trial if without the perjury the jury might not have convicted." 416 F.2d at 577.

Appellants submit that the district court erred on both counts. With respect to the question of non-disclosure of material evidence in the government's possession, we respectfully refer the court to Point I(C) of the Stofsky brief, in which appellants Hoff and Lageoles previously have joined. 10/

10/ In summary appellants argued that, in light of the theory of the defense, the government had the duty to examine and produce Glasser's tax returns, which, of course, were in the possession of the Internal Revenue Service. See ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function § 3.11 (Approved Draft 1971). The inadvertent failure to do so requires application -- at the least -- of the Miller-Sperling new trial standard (see ante at 18).

We add only that the government was well aware of the crucial importance of the issue of the source of Glasser's wealth and of the obvious impact that Glasser's tax returns might have on that issue. This awareness is demonstrated by the fact that the government was ready to call Mrs. Glasser as a witness solely on the question of the source of the Glasser fortune immediately after Glasser's testimony, and that the prosecuting attorney justified such testimony on the grounds that it related to a "central issue in the case" (178a). But having recognized the importance of the issue, the prosecutor made no effort to investigate the truthfulness of Mrs. Glasser's corroborating testimony before putting her on the stand in such a hurried fashion. Such an investigation, of course, would have revealed the probate records which seemed to belie the Glassers' account of the source of their wealth. And the prosecutor still failed to make proper investigations and disclosure prior to his improper effort in summation to explain away the probate records by in effect giving "expert" legal testimony on the manner in which Mrs. Glasser purportedly received her inheritance. See ante n. 7 ; post n. 14.

We show here that even in the absence of culpable government non-disclosure, the nature and quality of the newly discovered

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10/ (Cont'd.)

In this context, the district court's effort to compartmentalize the government by distinguishing between the prosecution and the IRS misses the point. We do not argue that the government must review and disclose the tax returns of every witness it presents at every criminal trial; only where the source and amount of a witness' financial assets are arguably relevant and material is that duty definitively triggered. This is especially true when, as here, IRS agents were part of the prosecution team and the defendants were charged and convicted of tax evasion. See, for example, United States v. Deutsch, 475 F.2d 55 (5th Cir. 1973), where the defendants were convicted of attempted bribery of postal employees by the testimony of a single witness whom they allegedly tried to bribe. The Court of Appeals held that the witness' Postal Department personnel file was Brady material, rejecting the view of the district court that the prosecutor had no obligation to disclose the file because the Post Office Department was not an arm of the government:

> "We find no reference in Brady to an arm of the prosecution. It was a Post Office employee who had been sought to be bribed. The government cannot compartmentalize the Department of Justice and permit it to bring a charge affecting a government employee in the Post Office and use him as its principal witness, but deny having access to the Post Office files. In fact it did not even deny access, but only present possession without even an attempt to remedy the deficiency. . . .[T]here is no suggestion in Brady that different 'arms' of the government, particularly when so

evidence requires application of the Larrison standard.

In both of its opinions denying appellants' motions for a new trial, the district court recognized that the Glassers had given deliberately misleading and false testimony at trial concerning the source of their wealth.[11/] Nevertheless, the court refused to apply the Larrison rule in deciding whether or not to grant the motions, despite the clear indications in such cases as Miller and Polisi that it was required. The district court purported to rely upon dictum in United States v. DeSapio, 435 F.2d 272 (2d Cir. 1970), where this court suggested that the Larrison rule perhaps should be limited to cases of prosecutorial misconduct. 435 F.2d at 286, n.14. The DeSapio court's reference to the problem was off-hand and without analysis, presumably because the issue was not directly

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10/ (Cont'd.)

> closely connected as this one for the purpose of the case, are severable entities. And, of course, the Brady rule requires the government to supply evidence useful to the defendant simply for impeachment purposes." 475 F.2d at 57 (emphasis added, footnotes and citations omitted).

See also Giglio v. United States, supra, 405 U.S. at 154.

11/ The issue of the source of the Glassers' wealth was recognized by both prosecution and defense as being of central importance to the case. See discussion ante at 8, 9.

presented. The district court's peremptory treatment of the question is less explicable, however, inasmuch as the district court relied on the distinction between the Larrison and Berry standards in denying the motions.

Analysis would have revealed that the Larrison rule developed independently of reference to Brady-type violations. Even a cursory reading of such cases as Hiss, Miller and Polisi reveals that those courts clearly distinguished the Larrison-type situation from cases of prosecutorial suppression of material evidence, whether intentional or inadvertent.

Indeed quite dispositively the Larrison rule is inappropriate for cases of prosecutorial suppression of evidence because it is not liberal enough. We have seen that Brady and its progency require a new trial in cases of government misconduct if the evidence is merely favorable or material to the defense. And "the materiality of the evidence to the defendant is measured by the effect of its suppression upon preparation for trial, rather than its predicted effect on the jury's verdict." United States v. Kahn, 472 F.2d 272, 287 (2d Cir. 1973); United States v. Polisi, supra. The Larrison rule, by focusing upon the effect of new evidence on

the jury's verdict and by requiring that it might have produced a different result at trial, is relevant only in a context where government misconduct is absent, but where the integrity of the trial was polluted by material perjury.

The DeSapio dictum also cannot be reconciled with decisions of the Supreme Court such as Mesarosh v. United States, 352 U.S. 1; Napue v. Illinois, 360 U.S. 264; and Giglo v. United States, 405 U.S. 150. Mesarosh is particularly instructive. There the government revealed to the Supreme Court, while the case was on appeal, that Mazzei, a government witness at the trial, probably had committed perjury in several subsequent proceedings. The new evidence did not show that Mazzei actually had committed perjury at Mesarosh's trial, nor did the government admit that he had. Nor was it alleged that the government had withheld evidence at trial, intentionally or inadvertently, about Mazzei's perjury in subsequent proceedings.[12/] Nevertheless, despite the absence of government misconduct and despite the absence of a Berry-type finding that a different verdict probably would result at a new trial, the Supreme Court vacated the convictions and

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12/ Nor, as this court recently noted, did "the granting of a new trial . . . depend upon "[Mazzei's] being deemed part of the prosecution team." United States v. Rosner, No. 74-2290 (April 29, 1975).

ordered a new trial:

> "Mazzei's credibility has been wholly discredited by the disclosures of the Solicitor General. No other conclusion is possible. The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other result than to accord petitioners a new trial." 352 U.S. at 9.[13]

Appellant submits that this court's dictum in footnote 14 of the DeSapio opinion was, with all due respect, an inadequately considered and unsupportable break with previous decisions in this and other circuits and in the Supreme Court.

13/ The Mesarosh Court distinguished the case from an ordinary motion for a new trial "presenting untruthful statements by a Government witness subsequent to the trial as newly discovered evidence affecting his credibility at trial." Id. at 9 (emphasis added). Such evidence, the Court wrote, is "merely cummulative or impeaching;" in Mesarosh, however, the new evidence was material to Mazzei's direct testimony against the defendants, without which at least two of the convictions could not stand. Id. at 10.

As is rather obvious and as we show post, the new evidence here with respect to Glasser is material to his direct testimony against appellants without which there would be no basis for the convictions. The new evidence conclusively demonstrates that Glasser committed massive perjury at trial on issues material to the defense theory of the case. Thus, it is not merely "cummulative or impeaching," and the Mesarosh-Larrison rule applies.

The court should return to the rule it previously followed, and apply the Larrison standard to motions for new trials where there is proof of material perjury against the defendants at the first trial. As the Court held in Mesarosh, the integrity of the federal judiciary demands no less.

C. A New Trial Is Required Pursuant To Any Standard.

Defendants Hoff and Lageoles were convicted on the testimony of one witness -- a witness who lied repeatedly at trial and who lied repeatedly after trial in an effort to cover up his trial perjury. Given the extent and nature of this perjury, going to "a central issue in the case" (178a), it is inconceivable that any of the standards for a new trial would not be met. We discuss the issue in terms of the strict DeSapio standard because that was the standard applied -- albeit erroneously -- by the district court, and because if the DeSapio standard is met, so too are each of the more liberal standards. Thus we address the question whether the new evidence "probably would produce a different verdict in the event of a retrial."

The case against Hoff and Lageoles turned entirely on the question of Glasser's credibility. At the trial the prosecutor and judge repeatedly emphasized this crucial aspect of the case. Thus the prosecutor insisted upon offering Mrs. Glasser's testimony, which was merely cooroborative of Glasser's testimony with respect to the source of his wealth, on the government's direct case immediately after Glasser's testimony. The testimony of Mrs. Glasser undoubtedly greatly supported Glasser's credibility with the jury.

At the conclusion of the evidence the Assistant United States Attorney hammered home to the jury his view that there was no apparent motive for Glasser to lie on any aspect of his testimony and, indeed, that lying was the only way in which Glasser could incur liability because of his grant of immunity.[14/]

14/ As already noted, ante n. 7, the United States Attorney attempted to explain away the discrepancy in the Glassers' testimony created by the introduction of the probate records by suggesting that Mrs. Glasser "inherited" the money from her parents by means other than directly through the estate. This effort clearly was improper as it amounted to unsworn testimony by the prosecutor not subject to cross-examination. See United States v. Drummond, 481 F.2d 62 (2d Cir. 1973); ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function §§ 5.8, 5.9 (Approved Draft 1971), and authorities cited therein. It undoubtedly

The defense, which of course did not have available the evidence adduced with respect to the two new trial motions, was hard put at the time to articulate a clear motive for Glasser's perjury. It argued that he was motivated by a quest for revenge and a felt need to implicate the defendants as the quid pro quo for his immunity grant. But the prosecutor was able to argue with some force that because the immunity grant allegedly preceeded Glasser's implication of the defendants, Glasser was under no compulsion to manufacture testimony against them. And, in the overall context of the case, a revenge motive was a rather weak theory, by itself, to explain Glasser's perjury.

14/ (Cont'd.)

carried undue weight with the jury because of the prestige associated with the prosecutor's office, the natural assumption on the part of the jury that the prosecutor had facts available to him on which he based his assertion, and the "legalistic" nature of the prosecutor's claim. The prosecutor in effect told the jury, "This is a complicated legal distinction which laymen cannot understand. It does not matter whether or not the money passed through probate -- Mrs. Glasser still received her fortune from her parents by other legalistic maneuvers." The jury, of course, had no competence or reason to challenge this "expert testimony" by the government's lawyer -- "expert testimony" which, of course, was totally untrue.

Nevertheless, as we already have noted, the jury remained quite skeptical of Glasser's veracity and it returned guilty verdicts on the Glasser charges only after being given a "modified" Allen charge.

At a retrial a jury would be more than skeptical of Glasser's honesty on the witness stand. It would have before it actual admissions and massive evidence of perjury and lies on numerous occasions concerning the "central issue" of Glasser's wealth. The government would be unable to use Mrs. Glasser as a corroborating witness for Glasser's honesty; indeed, the fact of Mrs. Glasser's massive perjury at the first trial would be material, relevant, and of great interest to the jury on the issue of the fact and motivation for Glasser's perjury. The United States Attorney at a new trial would be unable to vouch for Glasser's veracity and to claim that it would be sheer folly for Glasser to perjure himself. Nor could the judge at a new trial charge the jury with respect to Glasser's credibility and honesty in the relatively favorable manner that the judge charged at the first trial. In short, there could be no question of Glasser's perjury and dishonesty; the only question would be its extent.

Nor would there any longer be any doubt about the motive for Glasser to commit perjury, not only about the source of his wealth but also about his central allegations that he paid money to the defendants. For, given the huge amounts of cash Glasser received illegally from 1962 through 1971 and which were not reported on his income tax returns, it is clear that Glasser was subject to substantial civil tax fraud penalties which would well total in excess of his total fortune. This must have been a terrifying prospect for an elderly, retired man whose wife was and remains ill. Glasser had a clear motive, which readily would be understood by any juror, to attempt to attribute as much of the manufacturers' payments which he received as going to the union defendants instead. Similarly, Glasser had a clear motive to attribute as much as possible of his fortune as deriving from sources other than illegal and unreported payments, such as inheritance, gifts, sale of jewelry, etc. Given Glasser's past massive pattern of perjury and deception on this issue, even to the United States Attorney after trial, a jury would be hard put to believe the latest explanation. Indeed, one can only wonder with amazement at the acceptance of these continuing series of "explanations" by the United States Attorney and the district court.

Moreover, at a new trial there would be clear evidence, which of course was lacking at the first trial, that Glasser indeed had pocketed substantial sums of cash over the years in addition to the $5,000 he admitted to at the first trial, and that he had hidden it from the government and from his business associates. Thus, at a new trial there would be substantial factual support for the defense's argument that no sums had been paid to the defendants and that Glasser had pocketed any and all amounts he received from the manufacturers. Glasser's pattern of deception, of course, would lend further support to this defense view.

The district court did not engage in a close analysis of the obvious effect this new evidence would have on a jury. It merely found that the new evidence "does [not] lead inevitably to the conclusion that Glasser lied about the pay-offs to the defendants." But even under the DeSapio standard, it is not necessary that the new evidence inevitably prove that the defendants were innocent. Rather, it is enough to show that the new evidence probably would produce a different verdict -- i.e., that it probably would induce a reasonable doubt among the jurors that the defendants were guilty. Cf., In re Winship, 397 U.S. 258; Mullaney v. Wilbur,

___ U.S. ___, 95 S.Ct. 1881. Much of the district court's error derived from its failure to apply this most basic rule.

The district court also stated that defense counsel would not use the newly discovered evidence at a second trial out of fear that Glasser would implicate the defendants in additional pay-offs (804a). In doing so the district court inexcusably -- and as it turns out incorrectly -- credited Glasser's post-trial explanations to the United States Attorney as completely true and credible. It did this without the benefit of a hearing at which Glasser's new story could be cross-examined, and even without a sworn affidavit from Glasser himself; rather, the only presentation of Glasser's new "explanation" was in affidavits of the Assistant United States Attorney, who merely paraphrased his recollections of what Glasser told him. And we now know that Glasser continued to lie to the Assistant United States Attorney at the time of the first new trial motion.

The district court's "difficult[y in] imagin[ing]" how the new evidence could be used effectively at a new trial is incredible. Glasser's effort to implicate the defendants further in his past criminal activity is inherently suspect given his substantial motive to lie, his failure to "reveal"

the information until his past criminal conduct was revealed, and his massive pattern of perjury. Indeed, we cannot imagine how even the most ordinary of defense counsel could fail to use the new evidence effectively both to destroy Glasser's credibility and, equally important, to lend substantial factual support to the defense theory of the case.

The district court further justified its denial of the two new trial motions by reliance upon alleged "totally independent evidence" which "supported" Glasser's testimony. First it referred to the testimony of two other manufacturers implicating "some of these defendants" (805a). But that testimony did not implicate defendants Hoff and Lageoles in any manner whatsoever; moreover, even with respect to the two other defendants, it did not corroborate Glasser's testimony of payments he made to the defendants. Second, the district court referred to the testimony of one manufacturer that he gave money to Glasser "with the understanding that it was going to union officials" (805a). But that same manufacturer also testified that he had no idea whether it actually did go to union officials nor did he have any reason to believe it did (98a). Thus, his testimony in no way conflicted with the defense's claim that Glasser took money from manufacturers

and kept it all.

Finally, the district court speculated at length that given the "small" nature of the fur industry, it would have been reasonable for the jury to conclude that Glasser must have paid the defendants because the manufacturers would have known about it if he did not. While it may or may not be reasonable to hinge criminal guilt on such a slim and ambiguous reed, such speculation is useless and irrelevant. The jury at the first trial did not have available the massive new evidence which it should have had and which a second jury would have; in the context of the first trial, therefore, the evidence of the nature of the fur industry, together with the court's Allen charge, may have been enough to sway a divided and uncertain jury. It simply was not open to the court, however, to guess what that jury or a second jury might or might not do when confronted with the quality and quantity of new evidence now available. "Only the jury can determine what it would do on a different body of evidence, and the jury can no longer act in the case." Mesarosh v. United States, supra, 352 U.S. at 12.

Finally, comparison to this court's recent decisions in United States v. Seijo, 514 F.2d 1357 (1975) and United States v. Rosner, No. 74-2290 (April 29, 1975) compels reversal and the granting of a new trial.[15] Unlike Rosner, the government's case against Hoff and Lageoles not only is weak without Glasser's testimony, but it is non-existent. Unlike Leuci's testimony in Rosner, Glasser's testimony was not corroborated by tapes or any other witnesses, except the now-admittedly perjurous testimony of Mrs. Glasser. Compare Seijo, supra. As in Seijo, "the jury was squarely faced with the hard question of whom to believe," 514 F.2d at 1364; Glasser's perjury, like Torres' in Seijo, "had it been known to the jury, would have exerted a compelling impact on his credibility."[16] Id. Compare United States v. Rosner, supra, slip op. at 3273, n.8. In short, it is "difficult to imagine" a case that more clearly requires a new trial.

15/ In Seijo, the court ordered new trials; in Rosner, the court affirmed a denial of a new trial.

16/ This is especially so because here, as in Seijo, the prosecutor emphasized the "truthfulness" of Glasser's testimony in its summation. See Seijo, supra, at 1365, n.10.

II

The Indictment Was Invalid Because Returned After The Grand Jury's Lawful Life Had Expired

The indictment against defendants was returned on June 21, 1973 in the twenty-seventh month of the grand jury's existence (A-93). It therefore is invalid unless the government can show clearly that the grand jury was convened pursuant to the Organized Crime Control Act of 1970, 18 U.S.C. § 3331. As established by this Court in United States v. Fein, 504 F.2d 1170 (2d Cir. 1974) and Wax v. Motley, 510 F.2d 318 (2d Cir. 1975), only grand juries so convened can be extended beyond the maximum tenure of eighteen months otherwise provided for grand juries by Rule 6 of the Federal Rules of Criminal Procedure. This is so regardless of whether or not the grand jury was treated as if it had been convened pursuant to the Act, whether or not it did in fact become involved in an extended investigation of organized criminal activity, and whether or not it was extended beyond eighteen months on the supposed authority of § 3331. United States v. Fein, supra, 504 F.2d at 1179-1180. The "original intention" of the district court judge who ordered the grand jury convened

is alone material. Wax v. Motley, supra, 510 F.2d at 321.

The court below did not disagree with these principles. Rather, it was "persuaded" that the order convening the grand jury "was meant to be premised on 18 U.S.C. § 3331" (A-128).

There is no evidence to support the district court's finding under the standards of proof established for this very question in Wax. Indeed, the finding cannot be supported under any standard. At the very most the record may sustain a finding that the prosecutor's office treated the grand jury as a § 3331 grand jury and caused judges other than the convening judge to act accordingly.

The order convening the grand jury was signed by the late Chief Judge Sidney Sugarman on March 23, 1971 (A-98). Neither the order nor the prosecutor's certificate requesting the grand jury (A-99) specified the authority pursuant to which the grand jury was to be convened. In this and all other material respects the order and certificate were the same as those in Wax.[17/] Accordingly, we are constrained by Wax, 510 F.2d at 320, to conclude that on their face the order and the certificate leave unresolved whether the grand jury was meant to be convened pursuant to § 3331.

17/ The Wax order and certificate appear as Exhibit A to Wax's Order to Show Cause filed in the Court of Appeals. The order is also described in the Court of Appeals' opinion, 510 F.2d at 320.

Put another way, the order and the certificate fail to show that the grand jury was a § 3331 grand jury.

Indeed, both documents are consistent with the usual method for convening an ordinary Rule 6 grant jury. Confirmation of this is provided by two orders signed by Chief Judge Sugarman convening grand juries prior to October 15, 1970, the effective date of the Organized Crime Control Act of 1970. They are identical to the March 23, 1971 order convening the grand jury at issue here. Further, the prosecutor's certificates requesting those orders are identical to the prosecutor's certificate for the March 23, 1971 order and are executed by the same Special Attorney (A-93, 101-106).

The grand jury was empanelled on April 20, 1971, nearly one month after Chief Judge Sugarman's order was issued. Judge Bonsal's instructions to the grand jury made clear his understanding that a § 3331 grand jury had been convened (A-112 et seq.). However, there is not a scintilla of evidence in the transcript or otherwise indicating that Judge Bonsal had obtained that understanding from Chief Judge Sugarman rather than from the prosecutor's office. On the contrary, it appears that such information as Judge Bonsal

had about the grand jury came exclusively from the latter. Judge Bonsal referred to the prosecutor having already informed the grand jurors of the provisions of § 3331 regarding length of service (A-112). He also related his understanding that the grand jury would probably sit only in the afternoons (A-112) and as to who the presenting assistants would be (A-117), information which could only come from the prosecutor's office.

On October 12, 1972, a few days short of eighteen months after the grand jury began sitting, Chief Judge Edelstein signed an order purporting to extend the life of the grand jury to April 20, 1973. On April 16, 1973, Judge Lasker signed an order further extending the grand jury's life to October 20, 1973. Both orders recited § 3331 as the authority for extending the grand jury's life. On June 21, 1973, the grand jury returned the instant indictment.

It appears that neither Chief Judge Edelstein nor Judge Lasker made any determination that the grand jury was a § 3331 grand jury. Both extension orders expressly rely upon the representations of the United States Attorney, in which the grand jury is referred to as a "Special Grand Jury" (A-108; A-110). Further, both orders were no doubt drawn by

the United States Attorney's office. Such was the practice as to grand jury orders generally in the Southern District, Wax, supra, 510 F.2d at 321, and the orders are identical in all respects.

To these record facts the government added nothing of significance except a pointed and unexplained silence. If the grand jury had been convened pursuant to § 3331, there necessarily would have been communications between Chief Judge Sugarman and the government concerning the nature of the grand jury to be convened. Nonetheless, the government failed to introduce any testimony regarding such communications, whether an affidavit by the Special Attorney whose certificate led to the convening of the grand jury or by any other person from the prosecutor's office who might have been involved. Nor did the Government file an affidavit purporting to set forth the recollection of those persons.

Indeed, nowhere in the affidavit the government did introduce (A-125) or elsewhere is it even asserted that Chief Judge Sugarman indicated in any manner an intention to convene a § 3331 grand jury. All that the government's affidavit purports to assert is that the "Strike Force"

"sought to have empanelled only Organized Crime Special Grand Juries" subsequent to the effective date of the Act, whatever that means. And even that assertion is inadmissible as hearsay and as being by a witness whose competence has not been established. The affiant merely swears to what he has been "advised" by the present Attorney-In-Charge of the Strike Force. The latter's statement was qualified as being only "to his knowledge," the basis and extent of which is not recounted. All we know is that he was not the Attorney-In-Charge of the Strike Force at the relevant times. See Rules 802 and 602 of the Federal Rules of Evidence.

Nor did the government introduce the only other evidence which might conceivably support a finding that the grand jury was convened pursuant to § 3331. Just as no affidavit or other testimony was obtained from the members of the prosecutor's office who would have dealt with Chief Judge Sugarman in that event, so too there was no affidavit or other testimony of Judge Bonsal as to the basis for his understanding of the grand jury's nature.

The government's silence is even more pointed when contrasted with the record it established in Wax. In addition

to introducing an affidavit by the convening judge, the government introduced a lengthy affidavit by the Special Attorney, who recounted in detail his conversations with the convening judge concerning the character of the grand jury to be convened. Wax, supra, 510 F.2d at 321. The government also introduced corroborating affidavits by another special prosecutor connected with the convening of the grand jury; by the Assistant United States Attorney in the Office of the United States Attorney with overall responsibility for grand juries at the time; and by still another Assistant United States Attorney connected with the grand jury.[18] Finally, the government introduced in Wax an affidavit by Judge Bonsal, who instructed the grand jury after it was empanelled.[19]

18/ These affidavits are part of Exhibit C to the Wax's Order to Show Cause in the Court of Appeals.

19/ Judge Bonsal's affidavit appears as Appendix A to the Brief for the United States in the Court of Appeals in Wax.

The government was well aware of the record made in Wax. The decision of the Court of Appeals was attached to defendant's moving papers (A-96). The government was also well aware of the high standard of proof of the intention of the convening judge explicitly established by this Court in Wax; even a cursory reading of the opinion can leave no doubt as to that matter. It nonetheless failed to introduce evidence comparable in any manner to that introduced in Wax and specified as necessary by this Court in its decision in that case.[20/]

Fein and Wax complete the record here. From those cases it appears that district court judges have taken a distinct lack of interest in matters concerning grand juries, placing an almost unquestioning reliance upon the prosecutor's office. The forms of orders have not been judicially examined,

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20/ While Chief Judge Sugarman died before the defendants' motion herein, the Special Attorney and perhaps other prosecutors connected with the grand jury could have attested to the relevant conversations or communications, if any. See Wax, supra, 510 F.2d at 320-321. That these persons may have retired from government service, as to which we have no information, should not have been a bar. The Special Attorney and other prosecutors in Wax were no longer in government service at the time they submitted affidavits. See the affidavits of Ambrose (the Special Attorney) and Maloney in Wax.

as this Court noted in Wax, 510 F.2d at 321. Nor have the contents. Orders extending grand juries pursuant to § 3331 have been signed without examination of the authority pursuant to which the grand jury was convened, as in Fein, and in the instant case.

It further appears that the reliance has been misplaced. With regard to the Organized Crime Control Act of 1970 at least, prosecutors have been far from careful in apprising the court of the relevant facts or in establishing appropriate records. Thus, the district court in Fein was not informed that the grand jury had been convened pursuant to Rule 6. As in Wax, the order did not reflect the fact that the grand jury was being convened pursuant to the Act.

Moreover, prosecutors have not even taken care to understand the Act and the judiciary's role in its administration. In Fein the prosecutor was evidently of the view that the convening order was of no consequence but that the grand jury may be "converted," 504 F.2d at 1170, by the prosecutor treating it as a § 3331 grand jury - a view this Court rejected.

On this record the district court must be reversed. In Wax, this Court considered the proof necessary to establish

that a grand jury was convened pursuant to the Act when the convening order is ambiguous on its face. Emphasizing that the judicial power to correct errors in such circumstances "must be sharply restricted," the Court established that there must be "clear recollections" of the convening judge's "original intention," 510 F.2d at 321. This standard was met in Wax by the "unusual circumstances" of the convening judge's recollection "of the matter and his own intentions" being fully corroborated by the Special Attorney involved. 510 F.2d at 321-22. Cf. Wight v. Nicholson, 134 U.S. 136, 145.

Here there are no "recollections," clear or otherwise. The district court did not assert there were. Totally ignoring Wax, it ruled on the basis of what it decided it was "reasonable to assume" (A-128).

The district court erred even if lesser standards than those required by Wax are applied. The district court based its finding exclusively on the conclusion that "[i]t is reasonable to assume that Judge Bonsal before making his remarks [to the grand jury] undertook to ascertain the factual basis for his assertions" (A-129). There are absolutely no facts or circumstances in this record that make this assumption "reasonable" and the court cites none. Indeed, the

contrary hypothesis is far more persuasive, as discussed above: that Judge Bonsal was informed by the prosecutor, nor Chief Judge Sugarman, that the grand jury was a § 3331 grand jury and accepted that assertion without verifying it with Judge Sugarman or even inquiring as to the basis of the prosecutor's belief. Further, it nowhere appears how the prosecutor might have reached his conclusion or even what the prosecutor believed was necessary to constitute a grand jury as a § 3331 grand jury.

The government's unexplained failure to introduce testimony by the Special Attorney and his assistants makes particularly compelling the conclusion that the district court's finding cannot stand under Wax or otherwise. Dispositive evidence is presumably within the personal knowledge of those persons. They naturally would be more favorably disposed to the government than defendants. In these circumstances, a negative inference may be drawn against the government under the normal rules of evidence. See Interstate Circuit v. United States, 306 U.S. 208, 225-26; J. Gerber and Co. v. S.S. Sabine Howaldt, 437 F.2d 580, 593 (2d Cir. 1971); United States v. Paulak, 352 F.Supp. 794, 798 (S.D.N.Y. 1972);

Wigmore, II On Evidence 162 et seq. (3d ed. 1940); McCormick, Law of Evidence 534 (1954). Adding to the force of the inference here is the weakness of the evidence adduced by the government, Interstate Circuit v. United States, supra, 306 U.S. at 226, and the fact that the government was put on unmistakable notice by Wax as to the evidence it should introduce.

However, it is not merely normal evidentiary principles that apply here. Consistent with the high standards of proof insisted upon in Wax, the government must be required to come forward with the best evidence or explain why that is not possible. It did neither.

The difficulties and confusions inherent in what are, in effect, nunc pro tunc amendments to judicial orders need not be emphasized here. See Wax, supra. However, one special circumstance must be noted. If the instant grand jury was a § 3331 grand jury, then the Wax grand jury was, in all probability, unlawfully extended for reasons never examined by this Court in Wax itself. Section 3332(b) establishes the circumstances under which a § 3331 grand jury can be convened if such a grand jury is already sitting: the district court must determine that the volume of business

of the already sitting grand jury exceeds its capacities. See the district court's opinion in Fein, 370 F.Supp. 466, 467 (E.D.N.Y. 1974). No such determination as to the instant grand jury appears to have been made in convening the Wax grand jury. If prior decisions are to be undermined in this manner, it should only be when the high standards of proof established by Wax are fully satisfied.

The result required here may be embarrassing to the district court as well as to the government. It may also affect several other prosecutions, though we have no information to that effect. However, such matters are of no consequence. In Wax this Court, well aware of the dangers to the decisional process, emphasized that the inquiry into the original intention of the convening court must be based upon evidence "excluding any considerations arising after the event," 510 F.2d at 321. And speaking more generally in Fein, this Court, noting that meritorious criminal proceedings must be frustrated, nonetheless insisted that "the rule of law must prevail and that the prosecution of those suspected of crime must itself proceed according to the law, and not otherwise," 504 F.2d at 1181.

Conclusion

The convictions of appellants Hoff and Lageoles should be reversed and the indictments should be dismissed. In the alternative, the case should be remanded to the district court for a new trial.

Respectfully submitted,

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